IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.447 OF 1987

1.Baburao Bala Bhosale
2.Sou.Parubai Baburao Bhosale
3.Sou.Sarubai Hanumant Nimbalkar ...Appellants

Vs.

Shankar Ramkrishna Kulkarni
(since deceased by heirs & L.Rs.)
1. Nandkumar Shankar Kulkarni
2. Ganesh Shankar Kulkarni
3. Sou.Mangal Madhukar Kulkarni
4. Sou.Smita Suresh Deshpande
5. Sou.Urmila Laxman Khade ...Respondents

Shri S.G.Page for the Appellants
Shri P.V.Samant for the Respondents.

CORAM: A.S.OKA, J.
DATED: MARCH 23,2005.

ORAL JUDGMENT:

1. The Second Appeal was admitted by this Court on 11st September 1987 by observing that substantial question is formulated in ground No.8 relating to plea of adverse possession. The said ground reads thus :

> 8. The question of title both of appellants as well as of the respondent-plaintiff is an substantial question of law involved in this Second Appeal.

2. By order dated 23rd July 2004 this Court exercised the power under the proviso Sub Section 5 of Section 100 of Code

of Civil Procedure, 1908 and following additional substantial question of law was framed :

. Whether the suit filed by the original plaintiff was barred by limitation, in view of the averments in the plaint and in the suit notice and in the light of Article 66 and 67 of the Limitation Act, 1963 ?

3. I have heard the parties on the aforesaid substantial questions of law. The Appellants are the original Defendants and the Respondents are the legal representatives of original Plaintiff. The case of the Plaintiff is that he is the owner of the suit property which is described in paragraph one of the plaint. The case of the original Plaintiff is that the suit property was let out to one Ganpati by a registered deed of lease on 10th January 1933 for a period of 25 years at the yearly rent of Rs.3/-. It is stated in the plaint that the original tenant expired on 1st December 1946. The Appellant no.1-Defendant No.1 is the son-in-law of the deceased tenant and the Appellant Nos.2 and 3 are the daughters of deceased tenant. The case made out in the plaint is that after demise of the original tenant, the tenancy rights were continued in favour of the Appellant Nos.2 and 3. The Appellant No.1 was helping them in carrying on business in the suit premises. The case of the Original Plaintiff is that after expiry of lease of 25 years the Appellants continued to occupy the suit

property as monthly tenants. Therefore, notice of termination dated 21st March 1978 was issued under Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as the said Act of 1882). As possession was not handed over a suit was filed by the original Plaintiff for possession and other reliefs.

4. The suit was contested by the Appellants by filing written statement. The main contention raised in the written statement is that father of the Appellant Nos.2 and 3 was carrying on business in the suit property as owner and after demise of their father, the Appellants are carrying on the business. It is the case of the Appellants that the original Plaintiff never demanded rent from them and never submitted any document to show that he is the landlord. Later on an application for amendment of the plaint was made by the original Plaintiff for incorporating the prayer in the alternative for claiming possession on the basis of the title.

5. The learned Trial Judge dismissed the suit filed by the original Plaintiff. The learned Trial Judge held that the Appellants have perfected their title to the suit property by adverse possession. In an Appeal preferred by the original Plaintiff, the decree of the Trial Court has been set aside and the decree for possession has been passed in favour of the Respondents.

6. Shri Page, learned Counsel for the Appellants submitted that after the demise of the original tenant at no stage the original Plaintiff demanded any rent and at no stage the rent was paid. The Appellants continued to occcupy the suit premises as owners thereof in their own right from the year 1946 and therefore, they had perfected their title by adverse possession. He has invited my attention to the assertions made in the notice of termination issued by the Plaintiff. Shri Page further submitted that as the Appellants have perfected their title by adverse possession, suit will be governed by Article 65 of the Limitation Act,1963. He submitted that even if Article 67 is to be applied, the suit was barred by limitation. The learned Counsel for the Respondents supported the impugned Judgment and Decree by pointing out the various findings recorded by the Appellate Court.

7. I have considered the rival submissions. The Appellate Court has recorded a finding that the lease for a period of 25 years is established and therefore, till the expiry of lease in the year 1958 the Appellants who were claiming through the original tenant cannot be said to be in adverse possession. The Appellate Court held that as the Appellants were all along claiming to be the owners of the suit property and they were not recognizing the original Plaintiff as owner of the suit property, plea of adverse possession has not been substantiated. The Appellate Court observed that there was

nothing on record to show that as to when the possession of the Appellants became adverse or hostile to the knowledge of the original Plaintiff. The Appellate Court proceeded to hold that the suit was within limitation as the suit was based on notice of termination issued under Section 106 of the said Act of 1882. The suit filed by the original Plaintiff was within period of 12 years from the date of termination of tenancy.

8. I have considered the rival submissions. In the suit notice it is alleged that after the demise of original tenant Ganpati, the tenancy was continued on the request of Appellant No.1. There is a specific assertion that on completion of term of the original lease, the Appellants were in possession as monthly tenants. The said notice is replied by the Advocate for the Appellants. It is pointed out in the reply that the Appellant Nos.2 and 3 are the daughters of deceased Ganpati. The Appellants have stated that they had no knowledge whether deceased Ganpati has acquired the property on lease from the original Plaintiff. It is stated that after the demise of Ganpati the original Plaintiff did not inform anything to the Appellants and never asserted rights of ownership. In fact, in the reply the Appellants claimed to be the owners. They have specifically asserted that the original Plaintiff was not concerned with the suit property. The plea of adverse possession requires factual foundation in the pleadings. In paragraph No.3 of the written statement, the Appellants have stated that they are the owners of the

property and they contended that if for want of evidence it is established that the original Plaintiff is the owner of the property, then the suit is hit by the principles of adverse possession. There is no assertion in the written statement that from a particular point of time, the possession of the Appellants became adverse or that from what point of time the Appellants started hostile possession to the knowledge of the original Plaintiff. If the assertions made in the written statement and reply to the said notice are perused, no fault can be found with the finding of the Appellate Court that there was nothing on record which shows that the possession of the Appellants became adverse or hostile to the knowledge of the original Plaintiff or true owner. Even assuming that Article 65 is applicable, period of limitation for filing of the suit on the basis of title is 12 years from the date on which the possession of the defendant became adverse. In absence of any specific plea on the part of the Appellants, the Appellate Court was right in setting aside the finding of the Trial Court as regards plea of adverse possession.

9. On plain reading of the plaint itself shows that it is a suit filed by the landlord to recover immovable property from the tenant. Article 67 of the said Act of 1963 read thus:

67.By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.

Therefore, Article which will be applicable to the suit as

framed is Article 67. The suit is based on notice dated 21st March 1978. The suit is filed in the year 1978. Even if the earlier notice of termination is to be considered, the same is issued on 23rd December 1970 and even from that date the suit is within limitation. In this view of the matter, the suit is within limitation.

10. Hence, there is no merit in the Appeal and the same is dismissed with no order as to costs.

11. At this stage Shri Page learned Counsel for the Appellants prays that stay to the execution of the decree be continued. The said prayer is opposed by the learned Counsel for the Respondent. Considering the fact that the Appellants are in possession of the suit property for a considerable long time, decree for possession shall not be executed for a period of eight weeks from today.

Judge.